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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

THE UNITED STATES, PETITIONER,

v.

PROVIDENT TRUST COMPANY, AS ADMINISTRATOR OF the Estate of George Theodore Roberts, Deceased

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General on behalf of the United States prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on April 10, 1933.

OPINION BELOW

The opinion of the Court of Claims is reported in 2 F. Supp. 472.

JURISDICTION

The judgment of the Court of Claims was entered April 10, 1933. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether medical testimony of the incapacity of a woman to bear children is admissible in order

to establish the right to deduct from the value of a testator's gross estate under Section 403 (a) (3) of the Revenue Act of 1918 the value of bequests made to charity limited upon the death of the testator's daughter without issue.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved appear in the Appendix, *infra*, pp. 8–9.

STATEMENT

The findings of fact of the Court of Claims (R. 4–5) may be summarized as follows:

George Theodore Roberts, a resident of the State of Pennsylvania, died testate in the year 1921. His will, after making certain bequests, devised the remainder of his estate to the respondent herein in trust to pay the income thereof to his daughter, Elizabeth Wentworth Roberts, during her natural life and upon her death to her lawful issue, and further provided that upon the decease of his daughter without issue the residuary estate so devised in trust should be distributed among certain charitable institutions and societies. The parties have agreed in writing that these institutions and societies are all included in that class of organizations bequests to which are deductible from the gross estate of a decedent under the provisions of Section 403 (a) (3) of the Revenue Act of 1918.

The testator left surviving him one child—Elizabeth Wentworth Roberts—who was born on June

10, 1871, and was 50 years of age at the time of her father's death. On February 9, 1914, she submitted to an operation upon the advice of a gynecologist, which resulted in the removal of the uterus, the Fallopian tubes, and both ovaries. After the operation she could not have become pregnant or given birth to a child. She died on March 12, 1927, unmarried, and without ever having given birth to a child.

On November 30, 1927, the Orphans' Court of Philadelphia County, Pennsylvania, awarded the residue of the estate subject to the payment of any transfer or inheritance taxes, to the organizations named in the will as residuary legatees.

The respondent was named the executor in the testator's will. The will was duly probated on March 16, 1921. Respondent later became administrator of the estate.

Respondent as executor filed a return for said estate and paid a tax of $5,353.70 on March 11, 1922. Later the Commissioner imposed an additional estate tax of $20,701.89, which was paid, with interest thereon, by the respondent on May 17, 1924.

Respondent on August 4, 1927, filed a claim for the refund of $18,404.05, or such greater amount as was legally refundable out of the taxes paid, on the ground that under the provisions of the will the value of the residuary estate less the value of the life estate should be allowed as a deduction from the gross estate. This claim for refund was rejected.

The estate tax must be determined as of the date of the testator's death. *Ithaca Trust Co.* v. *United States*, 279 U.S. 151, 155. Unless it was permissible to prove that the testator's daughter was incapable of having issue, the charitable bequests were dependent upon a condition unfulfilled on the date of the testator's death, and no deduction was allowable. Reg. 37, Art. 566, *infra*, p. 9; *Humes* v. *United States*, 276 U.S. 487.

The Court of Claims gave judgment for respondent in the sum of $17,204.66, with interest.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In receiving medical testimony of the incapacity of the testator's daughter to bear children.

2. In holding on the basis of evidence of the incapacity of the testator's daughter to bear children that a deduction was allowable from the value of the testator's gross estate under Section 403 (a) (3) of the Revenue Act of 1918 for bequests to charity limited upon the death of the testator's daughter without issue.

3. In giving judgment for the respondent.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Farrington* v. *Commissioner of Internal Revenue*, 30 F. (2d) 915, certiorari denied, 279 U.S. 873. The irrebuttable presumption that women are capable of childbearing so long as they live was there applied to defeat the

contention that bequests to charity could be proved deductible from a testator's gross estate under Section 403 (a) (3) of the Revenue Act of 1921, when the bequest was limited upon the life tenant's dying without issue. The Circuit Court of Appeals recognized that the presumption of childbearing capacity is a conclusive one. Under the decision of the Circuit Court of Appeals the presumption is a rule of evidence that renders testimony of the incapacity to bear children inadmissible for any purpose. See also *Flora* v. *Anderson,* 67 Fed. 182 (C.C.S.D.Ohio), reaffirmed, 75 Fed. 217 (C.C.S.D. Ohio). The case at bar cannot therefore be distinguished on the ground that the evidence presented here was more satisfactory proof of lack of capacity.[1]

The decision of the Farrington case, *supra,* has recently been followed in the Board of Tax Appeals when evidence of a surgical operation was offered to show the impossibility of issue in order to secure a deduction under Section 303 (a) (3) of the Revenue Act of 1926. *Guaranty Trust Co.* v. *Commissioner of Internal Revenue,* No. 45500, Board of Tax Appeals, decided January 31, 1933, 27 B.T.A. —.

2. The decision of the court below is contrary to the great weight of authority. *Hill* v. *Sangamon*

[1] In the *Farrington* case the life tenant was a woman of 52 years who, though having been married for over 29 years, had never borne a child, and medical testimony was offered to show the impossibility of issue in that her menopause had occurred approximately 6 years prior to testator's death. See 13 B.T.A. 277.

Loan & Trust Co., 295 Ill. 619; *Gettins* v. *Grand Rapids Trust Co.*, 249 Mich. 238; *Azarch* v. *Smith*, 222 Ky. 566; *Sterrett's Estate*, 300 Pa. 116; *May* v. *Bank of Hardinsburg & Trust Co.*, 150 Ky. 136; *Lovering* v. *Lovering*, 129 Mass. 97; *Towle* v. *Delano*, 144 Mass. 95; *List* v. *Rodney*, 83 Pa. 483; *In re Ricard's Trust Estate*, 97 Md. 608; *Bowlin* v. *Rhode Island Hospital Trust Co.*, 31 R.I. 289; *In re Dougan*, 139 Ga. 351; *Fletcher* v. *Los Angeles Trust etc. Bank*, 182 Cal. 177; *Riley* v. *Riley*, 92 N.J.Eq. 465; *Flora* v. *Anderson*, *supra*; *Bowen* v. *Frank*, 179 Ark. 1004; *In re Dawson*, L.R. 39 Ch. Div. 155; *In re Hocking* [1898] 2 Ch. 567.

The rule rests upon grounds of public policy and morals. *Hill* v. *Sangoman Loan & Trust Co.*, *supra*, p. 622.

There are a few American cases which have allowed the presumption of childbearing capacity to be rebutted in order to decree the distribution of legacies, or to terminate a trust, or to determine the marketable title of property. *Moore's Executor* v. *Beauchamp*, 5 Dana (Ky.) 70; *Whitney* v. *Groo*, 40 App. D.C. 496; *Gowen's Appeal*, 106 Pa. 288; *Male* v. *Williams*, 48 N.J.Eq. 33; *Mellon's Estate*, 16 Phila. (Pa.) 323; *Bacot* v. *Fessenden*, 130 App. Div. (N.Y.) 819, 823.[2]

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[2] Even in such cases a bond is frequently required to protect the interests of the unborn children. The results of these cases may be reached without deciding that the presumption may be rebutted. See *DuPont* v. *DuPont*, 159 Atl. 841 (Del. Ch. 1932); *Miller* v. *Macomb*, 26 Wend. (N.Y.) 229; cf. *Ansonia Nat. Bank* v. *Kunkel*, 105 Conn. 744.

A number of English cases have allowed the presumption to be rebutted when no interest other than that of the unborn children is adversely affected. *In re White* [1901], 1 Ch. 570, and cases therein cited.

3. The question involved is one of present importance in Federal estate-tax law, and the elimination of the conflict of authority is required for orderly administration of the Federal estate tax. The provision of the 1918 Act here involved has been reenacted without material change in the Revenue Acts of 1921, 1924, and 1926, and the Regulations pursuant thereto have remained in substance the same. Revenue Act of 1921, c. 136, Sec. 403 (a) (3), 42 Stat. 227, 279–280, Reg. 63, Arts. 47, 50; Revenue Act of 1924, c. 234, Sec. 303 (a) (3), 43 Stat. 253, 305–306 (U.S.C., Title 26, Sec. 1095 (a) (3)), Reg. 68, Arts. 44, 47; Revenue Act of 1926, c. 27, Sec. 303 (a) (3), 44 Stat. 9, 72 (U.S.C.App., Title 26, Sec. 1095 (a) (3)), Reg. 70 (1926 ed.) Arts. 44, 47. The provision of Section 303 (a) (3) of the 1926 Act material here is still in effect. U.S.C. Sup. VI, Title 26, Sec. 412 (d); Reg. 70 (1929 ed.), Arts. 44, 47.

Wherefore, it is respectfully submitted that the petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

JUNE 1933.

APPENDIX

Section 403 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098–1099, provides in part as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. * * *

Treasury Regulations 37 provide in part as follows:

> ART. 53. *Public, charitable, and similar bequests.*—Bequests to religious, charitable, scientific, literary, or educational corporations are deductible only if the corporation is organized or operated exclusively for one of the purposes specified (see Art. 54).

Similarly, in the case of a trust, the trust must be exclusively for such purposes. It does not prevent deduction, however, that the property placed in trust is also subject to another trust for a private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. *Conditional bequests.*—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.

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